

# **CHAPTER 9:**



## **CONTINUING RESOLUTION AUTHORITY & FUNDING GAPS**

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**CONTINUING RESOLUTION AUTHORITY (CRA) & FUNDING GAPS**

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## CHAPTER 9

### CONTINUING RESOLUTION AUTHORITY (CRA) & FUNDING GAPS

#### I. INTRODUCTION

#### II. REFERENCES

- A. Office of Management and Budget Circular A-11, Section 123, Apportionments Under a Continuing Resolution, and Section 124, Agency Operations in the Absence of Appropriations (2013) [OMB Cir. A-11] (*available at* [http://www.whitehouse.gov/omb/circulars\\_a11\\_current\\_year\\_a11\\_toc](http://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc)).
- B. General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law, Vol. II, Ch. 8, Continuing Resolutions, GAO-06-385SP (3d ed. 2006) and Annual Update of the 3rd Edition, March 2008, Ch. 8, Continuing Resolutions, GAO-08-450SP [GAO Red Book] (*available at* <http://www.gao.gov/assets/210/202819.pdf>).
- C. Public Law 112-175 (28 September 2012), the 2013 Continuing Resolution (*available at* <http://www.gpo.gov/fdsys/pkg/PLAW-112publ175/pdf/PLAW-112publ175.pdf>).
- D. DOD 7000.14-R, Department of Defense Financial Management Regulations (FMRs), Glossary, (*available at* <http://comptroller.defense.gov/fmr.aspx>).
- E. Defense Finance and Accounting Service--Indianapolis Regulation 37-1, Finance and Accounting Policy Implementation, (Jan. 2000 with changes through December 2012). [DFAS-IN 37-1] (*available at* <http://www.asafm.army.mil/offices/BU/Dfas371.aspx?OfficeCode=1200>).

#### III. DEFINITIONS

- A. Continuing Resolution (CR).
  - 1. Definition: “An appropriation, in the form of a joint resolution, that provides **budget authority** for federal agencies, specific activities, or both to continue operation when Congress and the President have not completed action on the regular appropriation acts by the beginning of the fiscal year.” (emphasis added) [GAO, A Glossary of Terms Used in the Federal Budget Process](#), GAO-05-734SP (Washington DC, Sep 2005) 35-36.

- a. **Budget Authority** - Budget authority means “the authority provided by Federal law to incur financial obligations . . .” [2 U.S.C. § 622\(2\)](#).
  - b. Examples of “budget authority” include appropriations, borrowing authority, contract authority, and spending authority from offsetting collections. [OMB Cir. A-11](#), § 20.4.
2. The Continuing Resolution, in the absence of an appropriation act, provides authority for Agencies to continue current operations. Such continuing resolutions are subject to OMB apportionment in the same manner as appropriations DOD 7000.14-R, [DOD Financial Management Regulation, Glossary](#).
  3. [A]n interim appropriation to provide authority for specific ongoing activities in the event that regular appropriations have not been enacted by the beginning of the fiscal year or the expiration of the previous continuing resolution. A continuing resolution has a fixed life. [DFAS 37-1](#), (Jan. 2000), para. 080401.
  4. Once the Continuing Resolution becomes a public law (after both houses of Congress have passed the bill and it has been signed by the President) it has the same force and effect as any other statute. *Oklahoma v. Weinberger*, 360 F. Supp. 724, 726 (W.D. Okla. 1973).
- B. **Funding Gap.** A funding gap occurs when previous budget authority expires and there exists no regular appropriations act or continuing resolution. [DFAS-IN 37-1](#), para. 0805.
- C. **Joint Resolution.** A joint resolution, with the exception of proposed amendments to the Constitution, become law in the same manner as bills. Like a bill, it may originate in either the House of Representatives or in the Senate. A joint resolution originating in the House of Representatives is designated "H.J. Res." followed by its individual number. If it originates in the Senate, it is designated "S.J. Res." followed by its number. Joint resolutions contain a "resolving clause" that states, "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That all, etc." **See** <http://thomas.loc.gov/home/lawsmade.bysec/formsfaction.html#joint>.
- D. **New Start.** Initiation, resumption, or continuation of any project, subproject, activity, budget activity, program element, and subprogram within a program element for which an appropriation, fund, or other authority was not available during the previous fiscal year. [GAO Redbook, Vol. II](#), p. 8-24 (Feb. 2006).

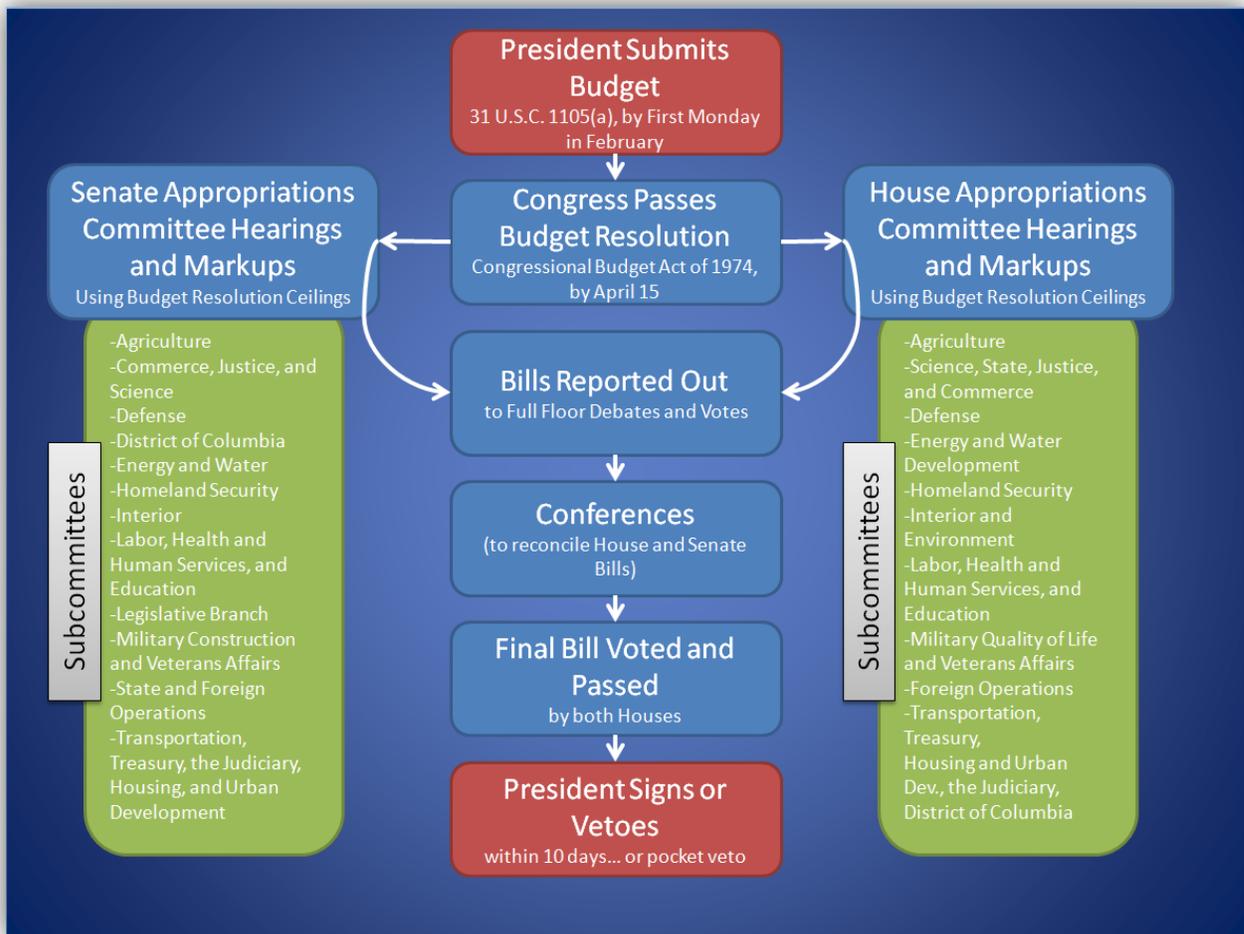
## IV. INTRODUCTION TO THE LEGISLATIVE PROCESS

- A. Background. The Constitution of the United States provides that positive authority is required to spend money. Art I, Sec 9, Clause 7. The Constitution gives Congress the authority to determine what rules will govern making the budget. Art I, Sec 5, Clause 2. Congress and the President must enact appropriations which provide funding for federal agencies to operate in a new fiscal year by October 1st, the first day of the fiscal year. [Congressional Budget & Impoundment Control Act of 1974](#) (P.L. 94-344). Historically, one or more of the required appropriations acts are delayed well beyond Oct.1st. See Congressional Research Service, Duration of Continuing Resolution in Recent Years (April 28, 2011), available at <http://www.fas.org/sgp/crs/misc/RL32614.pdf>.
- B. The Congressional Budget Process. [The Congressional Budget Act of 1974](#) (Titles I-IX of P.L. 93-344, 2 U.S.C. 601-688) established the congressional budget process which provides timelines to ensure Congress completes its work on budgetary legislation by the start of the Fiscal Year. CRS Report for Congress, March 20, 2008, [98-472 GOV](#). The federal budget establishes the level of total spending and revenues as well as how the spending should be dividend up. The budgetary timetable is below<sup>1</sup>:

<b>Deadline</b>	<b>Action to be completed</b>
First Monday in February	President submits budget to Congress.
February 15	CBO submits report on economic and budget outlook to Budget committees.
Six weeks after President's budget is submitted	Committees submit reports on views and estimates to respective Budget Committee.
April 1	Senate Budget Committee reports budget resolution.
April 15	Congress completes action on budget resolution.
June 10	House Appropriations Committee reports last regular appropriations bill.
June 30	House completes action on regular appropriations bills and any required reconciliation legislation.
July 15	President submits mid-session review of his budget to Congress.
October 1	Fiscal year begins.

<sup>1</sup> Congressional Research Service, [Introduction to the Federal Budget Process](#) (December 3, 2012), Table 1 at p. 12.

- C. **Appropriation Process.** The overall appropriations process begins when the President submits the budget proposal for the next Fiscal Year. [The Congressional Budget Act of 1974](#) (2 U.S.C. 601-656 (2012)) requires Congress to adopt a Budget Resolution setting spending limits for each appropriations subcommittee. Using those figures as a ceiling, the committees draft and mark up proposed legislation that is eventually approved by the full appropriations committees and reported out to the floor of the respective house (House or Senate) for debate and vote. Once passed within each house, the House and Senate versions are reconciled using a Conference Report. Once a final bill is agreed to by both houses, it is passed and submitted to the President for final signature or veto. The chart below illustrates this process:



- D. Forms of Congressional Action. Congress introduces proposals in one of four forms: a bill, a joint resolution, a concurrent resolution, or a simple resolution. The most customary form is the bill. Continuing Resolutions are joint resolutions.
1. House & Senate Appropriations Committees draft the federal appropriations acts for consideration and passage by Congress. The level of appropriations are limited by the Budget Resolution, drafted by the Budget Committee. For more information, see <http://appropriations.house.gov/> and <http://www.appropriations.senate.gov/>.
  2. The House & Senate Armed Services Committees are responsible for the annual defense authorization bill. For more information, see <http://armed-services.senate.gov> and <http://armedservices.house.gov>.
- E. There are 13 appropriations acts regularly passed by Congress. The Department of Defense generally operates under two appropriations acts - the Department of Defense Appropriations Act and the Military Construction Appropriations Act.
- F. Congress can pass appropriations acts separately or as a group.
1. When the appropriations acts are passed as a group, they are referred to as a "Consolidated Appropriation Act" (CAA) or an Omnibus Appropriations Act.
  2. When passed separately, the DOD Appropriations Act (DODAA) provides funding for most of DOD's normal operations.
  3. The Military Construction Appropriations Act (MILCON AA) provides funding for military construction projects.
  4. Since deploying troops to Iraq and Afghanistan, Congress has typically used Emergency Supplemental Appropriations to fund overseas contingency operations.
- G. The National Defense Authorization Act (NDAA) is an act that provides authority to execute the programs specified in it. An authorization act differs from the appropriations act in that the authorization act does not have any funding attached to it. It only provides authority to spend funds. It essentially gives us additional purposes that we can spend money on.

## V. GOVERNMENTAL OPERATIONS DURING FUNDING GAPS

### A. Continued Operations – History as Potential Antideficiency Act Violations.

1. Background. The Attorney General issued two opinions in the early 1980s stating the language and history of the Anti-deficiency Act unambiguously prohibits agency officials from incurring obligations in the absence of appropriations. In 1995, following those two memorandums, the Office of Legal Counsel of the Department of Justice issued an opinion reaffirming and updating the prior memos. [OMB Cir. No. A-11](#), Sec. 124.1. This 1995 memo is often referred to as the "Dellinger Memo."
2. Additionally, the Comptroller General opined that permitting federal employees to work after the end of one fiscal year and before the enactment of a new appropriations act or a Continuing Resolution violates the Antideficiency Act (ADA). [Representative Gladys Noon Spellman, B-197841](#), March 3, 1980 (unpub).
3. Memorandum #1: The President asked the Attorney General if an agency can lawfully permit its employees to continue work after the expiration of the agency appropriation for the prior fiscal year and prior to any appropriation for the fiscal year. The Attorney General opined that absent an appropriations act or a Continuing Resolution, executive agencies must take immediate steps to cease normal operations. "Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriations," Opinion of the U.S. Attorney General, Benjamin R. Civiletti, 43 U.S. Op. Atty. Gen. 224, 4A U.S. Op. Off. Legal Counsel 16 (April 25, 1980). [See Appendix A](#).
4. Memorandum #2: The President asked the Attorney General what activities could continue to occur during a funding gap. "[Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations](#)" Opinion of the U.S. Attorney General, Benjamin R. Civiletti, 43 U.S. Op. Atty. Gen. 293, 5 Op. O.L.C.1 (January 16, 1981).
5. Memorandum #3: The Dellinger Memo. In anticipation of a potential funding gap, the Clinton Administration requested updated guidance on the scope of permissible government activity. In response, the Department of Justice reemphasized the restricted level of allowable government activity. The Memo also noted, however, that a lapse in appropriations will not result in a total "government shut-down." DOJ Memorandum for Alice Rivlin, Office of Management and Budget, Aug. 16, 1995 ([Appendix B](#)).

B. Continued Operations - Permissible Activities.

1. The Office of Management and Budget (OMB) issues guidance concerning actions to be taken by agencies during funding gaps.
  - a. Agencies must develop contingency plans to conduct an orderly shutdown of operations.
  - b. During a funding gap, agencies may continue:
    - (1) Activities otherwise authorized by law, e.g., activities funded with multi-year or no-year appropriations;
    - (2) Activities authorized through extraordinary contract authority. *See, e.g.,* [41 U.S.C. § 11](#) (Feed and Forage Act).
    - (3) Activities that protect life and property. *See, e.g.,* [31 U.S.C. § 1342](#).
    - (4) Activities necessary to begin phase-down of other activities. *See* Attorney General Opinion, Apr. 25, 1980 ([Appendix A](#)).
2. In 1990 Congress amended [31 U.S.C. §1342](#), to restrict the authority of agencies to cite the safety of life or the protection of property as the basis for continuing operations. Congress excluded "ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property" from the scope of permissible activities that may be continued during a funding gap. *See* [Appendix C](#).
3. DFAS Guidance.
  - a. [DFAS-IN 37-1](#), para. 0805, provides the following guidance concerning operations during a funding gap:
    - (1) No new obligations may be incurred unless they can be lawfully funded from prior appropriations or are specifically authorized by law.
    - (2) Neither prior year unexpired funds of multi-year appropriations nor revolving funds are impacted by the absence of a new appropriation or a CRA.
  - b. [DFAS-IN 37-1](#), para. 1604, provides additional details concerning disbursements permitted during funding gaps. Such disbursements may be made:

- (1) To liquidate prior-year obligations;
  - (2) To liquidate new obligations for unexpired multi-year appropriations;
  - (3) To liquidate obligations for revolving funds and trust funds (no year) while cash balances exist; and,
  - (4) To liquidate obligations made during a previous CRA.
4. In April 2011, DOD issued detailed guidance addressing what activities the military departments and other DOD agencies could perform during the absence of appropriations (*i.e.*, a funding gap). This information as well as additional guidance can be found in the CRA General Guidance. (*See* References & [Appendix D](#)).
- a. Activities that could continue during the funding gap:
    - (1) Units and the administrative, logistical, and maintenance functions required in support of major contingency tasking;
    - (2) Units and personnel supporting ongoing international treaties, commitments, essential peacetime engagement and counterdrug operations;
    - (3) Units and personnel preparing for or participating in operational exercises;
    - (4) Functions or activities necessary to protect life and property or to respond to emergencies;<sup>2</sup>
    - (5) Educational activities deemed necessary for immediate support of permissible activities;
    - (6) Educational activities not otherwise allowed if undertaken by active duty military personnel for other active military personnel only;
    - (7) Negotiation, preparation, execution, and administration of new/existing contracts for permissible activities/functions;<sup>3</sup>

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<sup>2</sup> Among the activities exempted from the "shut-down" include: fire protection, physical security, law enforcement, air traffic control and harbor control, utilities, housing and food services for military personnel, trash removal, and veterinary services in support of exempt functions (*i.e.*, food supply and service inspections).

<sup>3</sup> For contract actions not within the scope of the original contract and that are in direct support of permissible activities, the contracting officer will cite one of the following three authorities in support of the new obligation: (1) the Constitution as interpreted by Attorney General opinions for general support of National Security operations, (2)

- (8) Litigation activities associated with imminent legal action, only so long as courts and administrative boards remain in session;
  - (9) Legal support for any permitted activities;
  - (10) MWR activities to the extent operated by NAF personnel; and
  - (11) Childcare activities, including Department of Defense Dependents Schools.
- b. Activities required to be suspended during the funding gap:
- (1) Basic, skill, and qualification training which will obligate current FY funds;
  - (2) Military Personnel Selection Boards and Administrative Boards;
  - (3) Routine medical procedures (including vaccinations) in DOD medical facilities for non-active duty personnel, and;
  - (4) PCS moves and TDY travel for active duty, reserve, and civilian personnel engaged in otherwise non-exempt activities using current FY funding.

5. Funding Gap Issues.

- a. Agencies generally cannot predict whether a funding gap will occur or estimate its duration. Consequently, it is difficult for agencies to plan for such gaps.
- b. Efficient operation of government is clearly compromised. *See* [General Accounting Office, Government Shutdown: Permanent Funding Lapse Legislation Needed, GAO/GGD-91-76, June 6, 1991](#); [General Accounting Office, Funding Gaps Jeopardize Federal Government Operations, No. PAD-81-31, Mar. 3, 1981](#).
- c. What if we incur unauthorized obligations? *See, e.g.,* [Department of Defense Appropriations Act, 1993, § 9049, Pub. L. No. 102-396, 106 Stat. 1876](#) ("All obligations incurred in anticipation of

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[41 U.S.C. § 11](#) for obligations covered by the Food and Forage Act , and (3) [31 U.S.C. § 1342](#) for obligations for protection of life and property against imminent danger.

this Act are hereby ratified and confirmed if otherwise in accordance with this Act.").

- d. Congress may provide funding for some operations that otherwise would not be funded. *See, e.g.*, Pay Our Military Act, 2013, [H.R. 3210](#) (Providing during a funding gap in FY14 continuing appropriations for pay and allowances for active duty military members and civilian and contractors providing support to those military members); Honoring the Families of Fallen Soldiers Act, 2013, [Pub. L. No. 113-44](#), 127 Stat. 555 (Providing during a funding gap in FY14 continuing appropriations for payment of death gratuities; funeral, burial, and transfer expenses; and basic housing allowance for dependents of a member who died on active duty).

## VI. CONTINUING RESOLUTIONS

### A. General Legal Implications of Continuing Resolutions.

1. If Congress fails to pass, or the President fails to sign, an appropriation act before 1 October, a funding gap occurs unless Congress passes, and the President signs, interim legislation authorizing executive agencies to continue incurring obligations. This interim legislation is referred to as a Continuing Resolution. It is a statute that has the force and effect of law. *See Oklahoma v. Weinberger*, 360 F. Supp. 724 (W.D. Okla. 1973).
2. Comparison of Continuing Resolutions with Appropriation Acts.
  - a. Appropriation acts appropriate specified sums of money. Continuing Resolutions specify a “rate” based on the last year’s appropriations (sometimes adjusted upwards or downwards), but do not specify sums of money.
  - b. Continuing Resolutions include language such as "such amounts as may be necessary" for continuing projects or activities at a certain "rate for operations" to signify the temporary nature of the appropriation.
    - (1) Traditional CRs do not usually appropriate specific sums of money, instead using terms such as “such amounts as may be necessary for continuing projects” at a certain “rate for operations.”
    - (2) In order to determine the sum of money appropriated for a given activity it is necessary to examine documents other than the resolution. For example, you may need to apply a

formula to previous year's appropriations to determine the amount under the current resolution.

- (3) The [Continuing Resolution for FY 2013](#) provided:

“That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for fiscal year 2013, and for other purposes, namely:

SEC. 101. (a) Such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2012 and under the authority and conditions provided in such Acts, for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in this joint resolution, that were conducted in fiscal year 2012, and for which appropriations, funds, or other authority were made available in the following appropriations Acts: . . .

(3) The Department of Defense Appropriations Act, 2012 (division A of Public Law 112-74) . . .”<sup>4</sup>

B. Availability of Appropriations as to Purpose under a Continuing Resolution.

1. Continuing Resolutions provide interim funding for projects or activities for which funding or authority was available in the previous year's appropriation. Generally, the scope of a Continuing Resolution's applicability is quite broad:

SEC. 103. Appropriations made by section 101 shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act.<sup>5</sup>

2. **New Starts.** Continuing Resolutions generally do not allow agencies to initiate new programs, or expand the scope of existing programs, projects, and activities. During a CR, a hot issue is generally how to define a “new

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<sup>4</sup> [Pub. L. 112-175](#) (September 28, 2012), the 2013 Continuing Resolution.

<sup>5</sup> Id.

start.” There are several authorities to consult: Congress, GAO, and Agency policy.

3. Congress. In recent years, Congress has expressly resolved differing interpretations by explicitly defining “new starts” in the continuing resolution itself.
  - a. For example, the [FY 2013 Continuing Resolution](#) provided, in part:

“SEC. 102. (a) No appropriation or funds made available [in this CR] shall be used for: (1) the new production of items not funded for production in fiscal year 2012 or prior years; (2) the increase in production rates above those sustained with fiscal year 2012 funds; or (3) the initiation, resumption, or continuation of any project, activity, operation, or organization . . . for which appropriations, funds, or other authority were not available during fiscal year 2012.”<sup>6</sup>
  - b. Under the definition in the FY 2013 CR, if an agency had authority and sufficient funds to carry out a particular program in the preceding year, that program is not a new project or activity regardless of whether it was actually operating in the preceding year. This type of language would seem to permit minor O&M construction and UMMC unless further restricted by policy.
4. GAO’s Take on New Starts. GAO has looked at the definition of “new start” in a series of cases.
  - a. Default: When continuing resolutions contain a section stating that no funds made available under the resolution shall be available to initiate or resume any project or activity which was *not conducted* during the proceeding fiscal year, GAO has found the term “projects or activities” to refer to the individual program rather than the total appropriation. See [Chairman, Nat’l Advisory Council on Extension and Continuing Educ.](#), [B-169472](#), 52 Comp. Gen. 270 (1972); [Secretary of the Interior](#), [B-125127](#), 35 Comp. Gen. 156 (1955).
  - b. Construction: GAO has also found that where, in the previous fiscal year, funds were available generally for construction of buildings, including plans and specifications, it was not a new start to begin a construction project under a CR– even though the specific construction project was not actually under way in the previous year. GAO hung its hat on the idea that, because funds

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<sup>6</sup> Id.

were available generally for construction in the previous year, this specific project was not a new project or activity and thus could be funded under the CR. See Lt. Gen. F.T. Unger, B-178131, Mar. 8, 1973.

- c. Variations: Uncle Bud's, Inc., 206 B.R. 889 (Bankr M.D. Tenn., 1997)(affirmed Vergos v. Uncle Bud's, Inc., No. 3-97-0296(M.D. Tenn., Aug, 17, 1998)(finding that under a continuing resolution, the bankruptcy court could collect a new quarterly fee as part of the bankruptcy process because, while the fee was new, the U.S. Trustee has long been required to collect fees imposed by law); Availability of Higher Educ. Act Loan Funds, B-201898, 60 Comp. Gen. 263 (1981)(finding that the Dept of Education could release \$25 million from its revolving fund for higher education loans, even though the authority to do so was not in the FY1980 appropriation, because Congress expressly specified that the funding for the continuing resolution was based on the FY1980 appropriation as passed by the House of Representatives, which included releasing funding for the loans); Environmental Defense Center v. Babbitt, 73 F.3d 867 (9<sup>th</sup> Cir. 1995)(finding that, under a FY1996 CR, the Dept of the Interior could not take final decision making on whether to list the California red-legged frog as an endangered species because Congress had banned use of FY 1995 funds from being used to make endangered species determinations and the FY1996 continuing resolution effectively continued the ban.)

5. Policy. When continuing resolutions are passed, typically agencies will come out with policy guidance that can further define the definition of a "new start."

- a. In 1998, The Assistant Secretary of the Army (Financial Management & Comptroller) provided guidance in Continuing Resolution General Guidance, (OASA-FMC, August 1998) regarding "new starts." At that time:
  - (1) Definition: A new start is the initiation, resumption, or continuation of any project, subproject, activity, budget activity, program element, and subprogram within a program element for which an appropriation, fund, or other authority was not available during the previous fiscal year.
  - (2) Military Personnel Appropriations. New starts for Military Personnel include new entitlements and new recruitment bonuses, which were not approved in previous legislation, and are not permitted. An example of a new start is the

payment of adoption expenses approved for the first time in FY89.

- (3) Operation and Maintenance (O&M). Continuation of normal operations is authorized. Obligations may be incurred for essential operating expenses, including expenses to cover annual contracts that are regularly awarded and obligated in full at the beginning of the fiscal year.
- (4) Modifications to O&M programs are generally permitted; they are not considered new starts or scope increases as they do not change the overall purpose of the program. O&M-funded minor construction is not considered a new start and is permitted. An example of an increase in scope of an ongoing program that would not be permitted under CRA is the inception of the National Training Center, which was initiated as a new phase of the Army's training program.
- (5) Procurement and Research, Development, Test and Evaluation (RDTE) Appropriations. Generally, a CRA allows previously approved programs to be released at rates sustained during the previous fiscal year. New start restrictions apply to the execution of new investment items not funded for production in the previous fiscal year. Items for which funding was provided in the previous year, or for which funding was provided in prior years and is still available for obligation (e.g., procurement items funded one or two years ago) are not considered new starts.
- (6) Military Construction Appropriations. Any project or activity for which an appropriation, fund, or other authority was not provided during the previous fiscal year is considered a new start and will not be initiated under CRA. Minor construction funded with Military Construction funds is considered a new start and may not be initiated under CRA. Planning and design is not considered a new start. Therefore, in general, only planning and design funds may be executed under CRA.

- b. When the actual appropriations act becomes law, expenditures made pursuant to the Continuing Resolution must be charged against the new appropriations act:

Sec. 107. Expenditures made pursuant to this joint resolution shall be charged to the applicable appropriation, fund, or authorization

whenever a bill in which such applicable appropriation, fund, or authorization is contained is enacted into law. [FY 2006 Continuing Resolution](#).

C. Availability of Appropriations as to Time under a Continuing Resolution.

1. A Continuing Resolution provides budget authority:
  - a. Until a fixed cut-off date specified in the Continuing Resolution;
  - b. Until an appropriations act replaces it; or
  - c. For an entire fiscal year, if no appropriations act is passed

2. The [FY 2013 Continuing Resolution](#) provided:

“SEC. 106. Unless otherwise provided for in this joint resolution or in the applicable appropriations Act for fiscal year 2013, appropriations and funds made available and authority granted pursuant to this joint resolution shall be available until whichever of the following first occurs:

(1) the enactment into law of an appropriation for any project or activity provided for in this joint resolution;

(2) the enactment into law of the applicable appropriations Act for fiscal year 2013 without any provision for such project or activity; or

(3) March 27, 2013.”

D. Availability of Appropriations as to Amount under a Continuing Resolution.

1. Continuing Resolutions provide the full amount of the previous year’s appropriation (with increases or decreases as specified) regardless of the duration of the individual CR. A three-day CR appropriates the same amount as a full-year CR. (*But see* apportionment requirements, below).
2. Current rate. GAO defines “current rate” as “the rate of operations carried on within the appropriation for the prior fiscal year. [B-152554](#), Nov. 4, 1974. The current rate is equivalent to the total appropriation, or the total funds which were available for obligation, for an activity during the previous fiscal year.” [GAO Redbook, Vol. II](#), ch. 8, Continuing Resolutions at p. 8-10 (2006).
  - a. Continuing Resolutions specifically establish the current rate with reference to the prior fiscal year’s appropriation. For example, the [FY 2013 Continuing Resolution](#) provided funding “at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2012.” Pub. L. 112-175 (2012).

- b. Comptroller General Interpretations.
- (1) One-year appropriation. When the program in question was funded by a one-year appropriation in the prior year, the current rate equaled the total funds appropriated for the program for the previous fiscal year. To the Hon. Don Edwards, House of Representatives, B-214633, 64 Comp. Gen. 21 (1984); In the Matter of CETA Appropriations Under 1979 Continuing Resolution Authority, B-194063, 58 Comp. Gen. 530 (1979).
  - (2) Multi-year appropriations. When the unobligated balance can be carried over from the prior fiscal year (e.g., under a multi-year appropriation), the amount available under the Continuing Resolution equaled the amount available for obligation in the prior fiscal year (i.e., the "current rate") less any unobligated balance carried over into the present year. National Comm. for Student Financial Assistance-Fiscal Year 1982 Funding Level, B-206571, 61 Comp. Gen. 473 (1982).
- c. Apportionment. OMB apportions the funds appropriated by Continuing Resolutions. [31 U.S.C. § 1512](#).
- (1) OMB provides apportionment guidance in the form of a Bulletin. For FY13, [OMB Bulletin 12-02](#) (28 September 2012) gave agencies specific guidance for implementation of the 2013 CR.
  - (2) Some funds are apportioned automatically. OMB specified for the 2013 CRA amounts would be automatically apportioned in a sum equal to the smaller of two calculations:
    - (a) The percentage of the year covered by the CR (in this case, OMB specified 48.77% of the FY was covered by the CR, from 1 October 2012 to 27 March 2013). That percentage of the previous year's appropriation is the amount to consider in this option.
    - (b) The historical seasonal rate of obligations for the covered period. In other words, agencies must identify how much they obligated during the same period last year.
    - (c) NOTE: When the previous FY also began with a CR, the agency may have altered its normal pattern

of obligations to respond to limited fiscal resources during the CR period. This may lead to an artificially low pattern of obligation from the previous fiscal year and skew this calculation, resulting in insufficient automatic apportionments.

- (d) In some cases, agencies that usually obligate or disburse their entire appropriation early in the FY (such as for grants, loans, and foreign aid) are prevented from doing so to preserve flexibility when the actual appropriations are debated and passed. Section 109 of the FY2013 CR made such a prohibition.
- d. Obligations incurred under Continuing Resolutions remain valid even if the appropriations finally passed by Congress are less than the amounts authorized by the Continuing Resolution. Treasury Withdrawal of Appropriation Warrants for Programs Operating Under Continuing Resolution, [B-200923](#), 62 Comp. Gen. 9 (1982); Staff Sergeant Frank D. Carr, USMC-Transferred Service Member-Dislocation Allowance, [B-226452](#), 67 Comp. Gen. 474 (1988).

3. Additional Budgetary Constraints.

- a. The [FY 2013 CR](#) contained the following provision:

SEC. 110. This joint resolution shall be implemented so that only the most limited funding action of that permitted in the joint resolution shall be taken in order to provide for continuation of projects and activities.

- b. The Average Rate Less Five Percent. During the life of the 1996 Continuing Resolution, agencies were required to reduce the rate of some operations by five percent.

Sec. 115. Notwithstanding any other provision of this joint resolution, except section 106, the rates for operation for any continuing project or activity provided by section 101 that have not been increased by the provisions of section 111 or section 112 *shall be reduced by 5 percent but shall not be reduced below the minimal level defined in section 111 or below the level that would result in a furlough.* [FY 1996 Continuing Resolution, H.J. Res. 108-4](#) (emphasis added).

- c. Reductions to Amount Appropriated. During the life of the 2014 Continuing Resolution, the rate for operations was calculated to reflect reductions to the FY13 appropriations made by the

Presidential Sequester and the Consolidated and Further Continuing Appropriations. *See* [FY 2014 Continuing Resolution, Pub. L. 113-46](#).

- E. Relationship of a Continuing Resolution to Other Legislation.
  - 1. A Continuing Resolution appropriates funds that are “not otherwise appropriated.” *See e.g.* [Appendix D](#). The CRA does not apply to an agency program funded under another appropriation.
  - 2. Specific inclusion of a program in a Continuing Resolution provides authorization and funding to continue the program despite expiration of authorizing legislation. [Authority to Continue Domestic Food Programs Under Continuing Resolution, B-176994](#), 55 Comp. Gen. 289 (1976).

## VII. CONCLUSION

- A. Continuing Resolutions are appropriations that authorize agencies to obligate funds based on authorities in the previous appropriations act, and at levels specified for continued operations. Agencies have authority under most continuing resolutions to engage in programs, projects, or activities for which the agency had authority during the previous year’s appropriation. However, no “new starts” are authorized. A new start is something the agency did not have budget authority to do under the last appropriations act.
- B. Funding gaps are times during which no appropriation, continuing resolution, or other budget authority exists to cover new obligations. In such situations, agency operations are severely restricted. In some cases, civilian employees not in an exempted status must be furloughed (placed on leave without pay). Military operations can continue, but travel and other expenses are severely restricted.
- C. In the case of both Continuing Resolutions and Funding Gaps, the Judge Advocate should look for recent guidance published by DOD or specific service comptroller offices. Properly advising commands on operations during continuing resolutions or funding gaps requires a detailed knowledge of applicable statutes and guidance

**APPENDIX A**  
**THE CIVILETTI MEMO**

(43 U.S. Op. Atty. Gen. 224, 4A U.S. Op. Off. Legal Counsel 16)  
APRIL 25, 1980

MY DEAR MR. PRESIDENT:

You have requested my opinion whether an agency can lawfully permit its employees to continue work after the expiration of the agency's appropriation for the prior fiscal year and prior to any appropriation for the current fiscal year. The Comptroller General, in a March 3, 1980 opinion, concluded that, under the so-called Antideficiency Act, 31 U.S.C. § 665(a), any supervisory officer or employee, including the head of an agency, who directs or permits agency employees to work during any period for which Congress has not enacted an appropriation for the pay of those employees violates the Antideficiency Act. Notwithstanding that conclusion, the Comptroller General also took the position that Congress, in enacting the Antideficiency Act, did not intend federal agencies to be closed during periods of lapsed appropriations. In my view, these conclusions are inconsistent. It is my opinion that, during periods of "lapsed appropriations," no funds may be expended except as necessary to bring about the orderly termination of an agency's functions, and that the obligation or expenditure of funds for any purpose not otherwise authorized by law would be a violation of the Antideficiency Act.

Section 665(a) of Title 31 forbids any officer or employee of the United States to:

involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

Because no statute permits federal agencies to incur obligations to pay employees without an appropriation for that purpose, the "authorized by law" exception to the otherwise blanket prohibition of § 665(a) would not apply to such obligations.<sup>7</sup> On its face, the plain and unambiguous language of the Antideficiency Act prohibits an agency from incurring pay obligations once its authority to expend appropriations lapses.

The legislative history of the Antideficiency Act is fully consistent with its language. Since Congress, in 1870, first enacted a statutory prohibition against agencies incurring obligations in excess of appropriations, it has amended the Antideficiency Act seven times.<sup>8</sup> On each occasion, it has left the original prohibition untouched or reenacted the prohibition in substantially the same language. With each amendment, Congress has tried more effectively to prohibit deficiency spending by requiring, and then requiring more stringently, that agencies apportion their spending throughout the fiscal year. Significantly, although though Congress, from 1905 to 1950, permitted agency heads to waive their agencies' apportionments administratively, Congress never permitted an administrative waiver of the prohibition against incurring obligations in excess or advance of

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<sup>7</sup> An example of a statute that would permit the incurring of obligations in excess of appropriations is 41 U.S.C. § 11, permitting such contracts for "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies" for the Armed Forces. See 15 Op. A.G. 209. See also 25 U.S.C. § 99 and 31 U.S.C. § 668.

<sup>8</sup> Act of March 3, 1905, Ch. 1484, § 4, 33 Stat. 1257; Act of Feb. 27, 1906, Ch. 510, § 3, 34 Stat. 48; Act of Sept. 6, 1950, Ch. 896, §1211, 64 Stat. 765; Pub. L. 85-170, § 1401, 71 Stat. 440 (1957); Pub. L. 93-198, § 421, 87 Stat. 789 (1973); Pub. L. 93-344, § 1002, 88 Stat. 332 (1974); Pub. L. 93-618, § 175(a)(2), 88 Stat. 2011 (1975).

## APPENDIX A THE CIVILETTI MEMO

appropriations. Nothing in the debates concerning any of the amendments to or reenactments of the original prohibition has ever suggested an implicit exception to its terms.<sup>9</sup>

The apparent mandate of the Antideficiency Act notwithstanding, at least some federal agencies, on seven occasions during the last 30 years, have faced a period of lapsed appropriations. Three such lapses occurred in 1952, 1954, and 1956.<sup>10</sup> On two of these occasions, Congress subsequently enacted provisions ratifying interim obligations incurred during the lapse.<sup>11</sup> However, the legislative history of these provisions does not explain Congress' understanding of the effect of the Antideficiency Act on the agencies that lacked timely appropriations.<sup>12</sup> Neither are we aware that the Executive branch formally addressed the Antideficiency Act problem on any of these occasions.

The four more recent lapses include each of the last four fiscal years, from fiscal year 1977 to fiscal year 1980. Since Congress adopted a fiscal year calendar running from October 1 to September 30 of the following year, it has never enacted continuing appropriations for all agencies on or before October 1 of the new fiscal year.<sup>13</sup> Various agencies of the Executive branch and the General Accounting Office have internally considered the resulting problems within the context of their budgeting and accounting functions. Your request for my opinion, however, apparently represents the first instance in which this Department has been asked formally to address the problem as a matter of law.

I understand that, for the last several years, the Office of Management and Budget (OMB) and the General Accounting Office (GAO) have adopted essentially similar approaches to the administrative problems posed by the Antideficiency Act. During lapses in appropriations during

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<sup>9</sup> The prohibition against incurring obligations in excess of appropriations was enacted in 1870, amended slightly in 1905 and 1906, and reenacted in its modern version in 1950. The relevant legislative debates occur at Cong. Globe, 41st Cong., 2d Sess. 1553, 3331 (1870); 39 Cong. Rec. 3687-692, 3780-783 (1905); 40 Cong. Rec. 1272-298, 1623-624 (1906); 96 Cong. Rec. 6725-731, 6835-837, 11369-370 (1950).

<sup>10</sup> In 1954 and 1956, Congress enacted temporary appropriations measures later than July 1, the start of fiscal years 1955 and 1957. Act of July 6, 1954, ch. 460, 68 Stat. 448; Act of July 3, 1956, ch. 516, 70 Stat. 496. In 1952, Congress enacted, two weeks late, supplemental appropriations for fiscal year 1953 without having previously enacted a temporary appropriations measure. Act of July 15, 1952, ch. 758, 66 Stat. 637.

<sup>11</sup> Act of July 15, 1952, ch. 758, §1414, 66 Stat. 661; Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831.

<sup>12</sup> In 1952, no temporary appropriations were enacted for fiscal year 1953. The supplemental appropriations measure enacted on July 15, 1952 did, however, include a provision ratifying obligations incurred on or since July 1, 1952. Act of July 15, 1952, ch. 758, § 1414, 66 Stat. 661. The ratification was included, without elaboration, in the House Committee-reported bill, H. Rep. No. 2316, 82d Cong., 2d Sess. 69 (1952), and was not debated on the floor. In 1954, a temporary appropriations measure for fiscal year 1955 was presented to the President on July 2 and signed on July 6. Act of July 6, 1954, ch. 460, 68 Stat. 448. The Senate Committee on Appropriations subsequently introduced a floor amendment to the eventual supplemental appropriations measure that ratified obligations incurred on or after July 1, 1954, and was accepted without debate. Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831. 100 Cong. Rec. 13065 (1954). In 1956, Congress's temporary appropriations measure was passed on July 2 and approved on July 3. Act of July 3, 1956, ch. 516, 70 Stat. 496. No ratification measure for post-July 1 obligations was enacted.

<sup>13</sup> Pub. L. 94-473, 90 Stat. 2065 (Oct. 11, 1976); Pub. L. 95-130, 91 Stat. 1153 (Oct. 13, 1977); Pub. L. 95-482, 92 Stat. 1603 (Oct. 18, 1978); Pub. L. 96-86, 93 Stat. 656 (Oct. 12, 1979).

## APPENDIX A THE CIVILETTI MEMO

this Administration, OMB has advised affected agencies that they may not incur any "controllable obligations" or make expenditures against appropriations for the following fiscal year until such appropriations are enacted by Congress. Agencies have thus been advised to avoid hiring, grant-making, nonemergency travel, and other nonessential obligations.

When the General Accounting Office suffered a lapse in its own appropriations last October, the Director of General Services and Controller issued a memorandum, referred to in the Comptroller General's opinion,<sup>14</sup> indicating that GAO would need "to restrain our FY 1980 obligations to only those essential to maintain day-to-day operations." Employees could continue to work, however, because of the Director's determination that it was not "the intent of Congress that GAO close down."

In my view, these approaches are legally insupportable. My judgment is based chiefly on three considerations.

First, as a matter of logic, any "rule of thumb" excepting employee pay obligations from the Antideficiency Act would have to rest on a conclusion, like that of the Comptroller General, that such obligations are unlawful, but also authorized. I believe, however, that legal authority for continued operations either exists or it does not. If an agency may infer, as a matter of law, that Congress has authorized it to operate in the absence of appropriations, then in permitting the agency to operate, the agency's supervisory personnel cannot be deemed to violate the Antideficiency Act. Conversely, if the Antideficiency Act makes it unlawful for federal agencies to permit their employees to work during periods of lapsed appropriations, then no legislative authority to keep agencies open in such cases can be inferred, at least from the Antideficiency Act.

Second, as I have already stated, there is nothing in the language of the Antideficiency Act or in its long history from which any exception to its terms during a period of lapsed appropriations may be inferred. Faithful execution of the laws cannot rest on mere speculation that Congress does not want the Executive branch to carry out Congress' unambiguous mandates. It has been suggested, in this regard, that legislative intent may be inferred from Congress' practice in each of the last four years of eventually ratifying obligations incurred during periods of lapsed appropriations if otherwise consistent with the eventually appropriations.<sup>15</sup> Putting aside the obvious difficulty of inferring legal authority from expectations as to Congress' future acts, it appears to me that Congress' practice suggests an understanding of the Antideficiency Act consistent with the interpretation I have outlined. If legal authority exists for an agency to incur obligations during periods of lapsed appropriations, Congress would not need to confirm or ratify such obligations. Ratification is not necessary to protect private parties who deal with the Government. So long as Congress has waived sovereign immunity with respect to damage claims in contract, 28 U.S.C. §§ 1346, 1491, the apparent authority alone of government officers to incur agency obligations would likely be sufficient to create obligations that private parties could enforce in court. The effect of the ratifying provisions seems thus to be limited to providing legal authority where there was none before, implying Congress' understanding that agencies are not otherwise empowered to incur obligations in advance of appropriations.

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<sup>14</sup> The entire memorandum appears at 125 Cong. Rec. S13784 (daily ed. Oct. 1, 1979) [remarks of Sen. Magnuson].

<sup>15</sup> Pub. L. 94-473, § 108, 90 Stat. 2066 (1976); Pub. L. 95-130, § 108, 91 Stat. 1154 (1977); Pub. L. 95-482, § 108, 92 Stat. 1605 (1978); Pub. L. 96-86, § 117, 93 Stat. 662 (1979).

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Third, and of equal importance, any implied exception to the plain mandate of the Antideficiency Act would have to rest on a rationale that would undermine the statute. The manifest purpose of the Antideficiency Act is to insure that Congress will determine for what purposes the Government's money is to be spent and how much for each purpose. This goal is so elementary to a proper distribution of governmental powers that when the original statutory prohibition against obligations in excess of appropriations was introduced in 1870, the only responsive comment on the floor of the House was, "I believe that is the law of the land now." Cong. Globe, 41st Cong., 2d Sess. 1553 (1870) [remarks of Rep. Dawes].

Having interpreted the Antideficiency Act, I would like to outline briefly the legal ramifications of my interpretation. It follows first of all that, on a lapse in appropriations, federal agencies may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law. There are no exceptions to this rule under current law, even where obligations incurred earlier would avoid greater costs to the agencies should appropriations later be enacted.<sup>16</sup>

Second, the Department of Justice will take actions to enforce the criminal provisions of the Act in appropriate cases in the future when violations of the Antideficiency Act are alleged. This does not mean that departments and agencies, upon a lapse in appropriations, will be unable logistically to terminate functions in an orderly way. Because it would be impossible in fact for agency heads to terminate all agency functions without incurring any obligations whatsoever in advance of appropriations, and because statutes that impose duties on government officers implicitly authorize those steps necessary and proper for the performance of those duties, authority may be inferred from the Antideficiency Act itself for federal officers to incur those minimal obligations necessary to closing their agencies. Such limited obligations would fall within the "authorized by law" exception to the terms of § 665(a).

This Department will not undertake investigations and prosecutions of officials who, in the past, may have kept their agencies open in advance of appropriations. Because of the uncertainty among budget and accounting officers as to the proper interpretation of the Act and Congress' subsequent ratifications of past obligations incurred during periods of lapsed appropriations, criminal sanctions would be inappropriate for those actions.

Respectfully,  
BENJAMIN R. CIVILETTI

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<sup>16</sup> See 21 Op. A.G. 288.

**APPENDIX B  
THE DELLINGER MEMO**

**GOVERNMENT OPERATIONS IN THE EVENT OF A LAPSE  
IN APPROPRIATIONS**

*A government agency may employ personal services in advance of appropriations only when there is a reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property, and when there is some reasonable likelihood that either or both would be compromised in some significant degree by the delay in the performance of the function in question.*

August 16, 1995

**MEMORANDUM OPINION FOR THE DIRECTOR  
OFFICE OF MANAGEMENT AND BUDGET**

This memorandum responds to your request to the Attorney General for advice regarding the permissible scope of government operations during a lapse in appropriations.<sup>1</sup>

The Constitution provides that “no money shall be drawn from the treasury, but in consequence of appropriations made by law.” U.S. Const. art. I, § 9, cl. 7. The treasury is further protected through the Antideficiency Act, which among other things prohibits all officers and employees of the federal government from entering into obligations in advance of appropriations and prohibits employing federal personnel except in emergencies, unless otherwise authorized by law. *See* 31 U.S.C. § 1341 *et seq.*<sup>2</sup>

In the early 1980s, Attorney General Civiletti issued two opinions with respect to the implications of the Antideficiency Act. *See Applicability of the Antideficiency Act Upon A Lapse in an Agency’s Appropriations*, 4A Op. O.L.C. 16 (1980); *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 5 Op. O.L.C. 1 (1981) (“1981 Opinion”). The 1981 Opinion has frequently been cited in the ensuing years. Since that opinion was written, the Antideficiency Act has been amended in one respect, and we analyze the effect of that amendment below. The amendment amplified on the emergencies exception for employing federal personnel by providing that “[a]s used in this section, the term ‘emergencies involving the safety of human life or the protection of property’ does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.” 31 U.S.C. § 1342.

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With respect to the effects of this amendment, we continue to adhere to the view expressed to General Counsel Robert Damus of the Office of Management and Budget that “the 1990 amendment to 31 U.S.C. § 1342 does not detract from the Attorney General’s earlier analyses; if anything, the amendment clarified that the Antideficiency Act’s exception for emergencies is narrow and must be applied only when a threat to life or property is imminent.” Letter from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Robert G. Damus, General Counsel, Office of Management and Budget (Oct. 19, 1993) (“*1993 Letter*”). In order to ensure that the clarification of the 1990 amendment is not overlooked, we believe that one aspect of the *1981 Opinion*’s description of emergency governmental functions should be modified. Otherwise, the *1981 Opinion* continues to be a sound analysis of the legal authorities respecting government operations when Congress has failed to enact regular appropriations bills or a continuing resolution to cover a hiatus between regular appropriations.

### I.

Since the issuance of the extensive *1981 Opinion*, the prospect of a general appropriations lapse has arisen frequently. In 1981, 1982, 1983, 1984, 1986, 1987, and 1990, lapses of funding ranging from several hours to three days actually did occur. While several of these occurred entirely over weekends, others required the implementation of plans to bring government operations into compliance with the requirements of the Antideficiency Act. These prior responses to the threat of or actual lapsed appropriations have been so commonly referred to as cases of “shutting down the government” that this has become a nearly universal shorthand to describe the effect of a lapse in appropriations. It will assist in understanding the true extent of the Act’s requirements to realize that this is an entirely inaccurate description. Were the federal Government actually to shut down, air traffic controllers would not staff FAA air control facilities, with the consequence that the nation’s airports would be closed and commercial air travel and transport would be brought to a standstill. Were the federal government to shut down, the FBI, DEA, ATF and Customs Service would stop interdicting and investigating criminal activities of great varieties, including drug smuggling, fraud, machine gun and explosives sales, and kidnapping. The country’s borders would not be patrolled by the border patrol, with an extraordinary increase in illegal immigration as a predictable result. In the absence of government supervision, the stock markets, commodities and futures exchanges would be unable to operate. Meat and poultry would go uninspected by federal meat inspectors, and therefore could not be marketed. Were the federal Government to shut down, medicare payments for vital operations and medical services would cease. VA hospitals would abandon patients and close their doors. These are simply a few of the significant impacts of a federal government shut down. Cumulatively, these actions and the others required as part of a true shut down of the federal government would impose significant health and safety risks on millions of Americans, some of which would undoubtedly result in the loss of human life, and

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they would immediately result in massive dislocations of and losses to the private economy, as well as disruptions of many aspects of society and of private activity generally, producing incalculable amounts of suffering and loss.

The Antideficiency Act imposes substantial restrictions on obligating funds or contracting for services in advance of appropriations or beyond appropriated levels, restrictions that will cause significant hardship should any lapse in appropriations extend much beyond those we have historically experienced. To be sure, even the short lapses that have occurred have caused serious dislocations in the provision of services, generated wasteful expenditures as agencies have closed down certain operations and then restarted them, and disrupted federal activities. Nevertheless, for any short-term lapse in appropriations, at least, the federal Government will not be truly “shut down” to the degree just described, simply because Congress has itself provided that some activities of Government should continue even when annual appropriations have not yet been enacted to fund current activities.

The most significant provisions of the Antideficiency Act codify three basic restrictions on the operation of government activities. First, the Act implements the constitutional requirement that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const. art. I, § 9, cl. 7. Second, when no current appropriations measure has been passed to fund contracts or obligations, it restricts entering into contracts or incurring obligations (except as to situations authorized by other law). Third, it restricts employing the services of employees to perform government functions beyond authorized levels to emergency situations, where the failure to perform those functions would result in an imminent threat to the safety of human life or the protection of property.<sup>3</sup> The *1981 Opinion* elaborated on the various exceptions in the Antideficiency Act that permit some continuing government functions, and we will only summarize the major categories here:

- Multi-year appropriations and indefinite appropriations.

Not all government functions are funded with annual appropriations. Some operate under multi-year appropriations and others operate under indefinite appropriations provisions that do not require passage of annual appropriations legislation. Social security is a prominent example of a program that operates under an indefinite appropriation. In such cases, benefit checks continue to be honored by the treasury, because there is no lapse in the relevant appropriation.

- Express authorizations: contracting authority and borrowing authority.

Congress provides express authority for agencies to enter into contracts or to borrow funds to accomplish some of their functions. An example is the “food and forage” authority

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given to the Department of Defense, which authorizes contracting for necessary clothing, subsistence, forage, supplies, etc. without an appropriation. In such cases, obligating funds or contracting can continue, because the Antideficiency Act does not bar such activities when they are authorized by law. As the *1981 Opinion* emphasized, the simple authorization or even direction to perform a certain action that standardly can be found in agencies' enabling or organic legislation is insufficient to support a finding of express authorization or necessary implication (the exception addressed next in the text), standing alone. There must be some additional indication of an evident intention to have the activity continue despite an appropriations lapse.

- Necessary implications: authority to obligate that is necessarily implied by statute.

The *1981 Opinion* concluded that the Antideficiency Act contemplates that a limited number of government functions funded through annual appropriations must otherwise continue despite a lapse in their appropriations because the lawful continuation of other activities necessarily implies that these functions will continue as well. Examples include the check writing and distributing functions necessary to disburse the social security benefits that operate under indefinite appropriations. Further examples include contracting for the materials essential to the performance of the emergency services that continue under that separate exception. In addition, in a 1980 opinion, Attorney General Civiletti opined that agencies are by necessary implication authorized “to incur those minimal obligations necessary to closing [the] agency.” The *1981 opinion* reiterated this conclusion and consistent practice since that time has provided for the orderly termination of those functions that may not continue during a period of lapsed appropriations.

- Obligations necessary to the discharge of the President's constitutional duties and powers.

Efforts should be made to interpret a general statute such as the Antideficiency Act to avoid the significant constitutional questions that would arise were the Act read to critically impair the exercise of constitutional functions assigned to the Executive. In this regard, the *1981 Opinion* noted that when dealing with functions instrumental in the discharge of the President's constitutional powers, the “President's obligational authority . . . will be further buttressed in connection with any initiative that is consistent with statutes — and thus with the exercise of legislative power in an area of concurrent authority — that are more narrowly drawn than the Antideficiency Act and that would otherwise authorize the President to carry out his constitutionally assigned tasks in the manner he contemplates.” *1981 Opinion*, at 6-7.

- Personal or voluntary services “for emergencies involving the safety of human life or the protection of property.”

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The Antideficiency Act prohibits contracting or obligating in advance of appropriations generally, except for circumstances just summarized above. The Act also contains a separate exception applicable to personal or voluntary services that deal with emergencies. 31 U.S.C. § 1342. This section was amended in 1990. We will analyze the effects of that amendment in Part II of this memorandum.

Finally, one issue not explicitly addressed by the *1981 Opinion* seems to us to have been settled by consistent administrative practice. That issue concerns whether the emergency status of government functions should be determined on the assumption that the private economy will continue operating during a lapse in appropriations, or whether the proper assumption is that the private economy will be interrupted. As an example of the difference this might make, consider that air traffic controllers perform emergency functions if aircraft continue to take off and land, but would not do so if aircraft were grounded. The correct assumption in the context of an anticipated long period of lapsed appropriations, where it might be possible to phase in some alternatives to the government activity in question, and thus over time to suspend the government function without thereby imminently threatening human life or property, is not entirely clear. However, with respect to any short lapse in appropriations, the practice of past administrations has been to assume the continued operation of the private economy, and so air traffic controllers, meat inspectors, and other similarly situated personnel have been considered to be within the emergency exception of section 1342.

### II.

The text of 31 U.S.C. § 1342, as amended in 1990, now reads:

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. As used in this section, the term “emergencies involving the safety of human life or the protection of property” does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

31 U.S.C. § 1342. Because of the section 1342 bar on employing personal services, officers and employees may employ personal services in excess of other authorizations by law only in emergency situations.<sup>5</sup> This section does not by itself authorize paying employees in emergency situations, but it does authorize entering into obligations to pay for such labor.

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The central interpretive task under section 1342 is and has always been to construe the scope of the emergencies exception of that section. When the *1981 Opinion* undertook this task, the predecessor to section 1342 did not contain the final sentence of the current statute, which was added in 1990. Examining that earlier version, the Attorney General concluded that the general language of the provision and the sparse legislative history of it did not reveal its precise meaning. However, the opinion was able to glean some additional understanding of the statute from that legislative history.

The Attorney General noted that as originally enacted in 1884, the provision forbade unauthorized employment “except in cases of sudden emergency involving the loss of human life or the destruction of property.” 23 Stat. 17. He then observed that in 1950, Congress enacted the modern version of the Antideficiency Act and accepted revised language for section 1342 that originally had been suggested by the Director of the Bureau of the Budget and the Comptroller General in 1947. In analyzing these different formulations, the Attorney General stated that

[w]ithout elaboration, these officials proposed that ‘cases of sudden emergency’ be amended to ‘cases of emergency,’ ‘loss of human life’ to ‘safety of human life,’ and ‘destruction of property’ to ‘protection of property. These changes were not qualified or explained by the report accompanying the 1947 recommendation or by any aspect of the legislative history of the general appropriations act for fiscal year 1951, which included the modern section [1341]. Act of September 6, 1950, Pub. L. No. 81-759, § 1211, 64 Stat. 765. Consequently, we infer from the plain import of the language of their amendments that the drafters intended to broaden the authority for emergency employment.

5 Op. O.L.C. at 9.

The *1981 Opinion* also sought guidance from the consistent administrative practice of the Office of Management and Budget in applying identical “emergencies” language found in another provision. That other provision prohibits OMB from apportioning appropriated funds in a manner that would indicate the need for a deficiency or supplemental appropriation, except in cases of “emergencies involving the safety of human life, [or] the protection of property” — phraseology identical to the pre-1990 version of section 1342.<sup>4</sup> Combining these two sources with the statutory text, the Attorney General articulated two rules for identifying functions for which government officers may enter into obligations to pay for personal services in excess of legal authority other than section 1342 itself:

First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.

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5 Op. O.L.C. at 8.

While we continue to believe that the 1981 articulation is a fair reading of the Antideficiency Act even after the 1990 amendment, *see 1993 Letter*, we are aware of the possibility the second of these two rules might be read more expansively than was intended, and thus might be applied to functions that are not emergencies within the meaning of the statute. To forestall possible misinterpretations, the second criteria's use of the phrase "in some degree" should be replaced with the phrase, "in some significant degree."

The reasons for this change rest on our understanding of the function of the 1990 amendment, which comes from considering the content of the amendment, its structure, and its sparse legislative history. That history consists of a solitary reference in the conference report to the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388:

The conference report also makes conforming changes to title 31 of the United States Code to make clear that . . . ongoing, regular operations of the Government cannot be sustained in the absence of appropriations, except in limited circumstances. These changes guard against what the conferees believe might be an overly broad interpretation of an opinion of the Attorney General issued on January 16, 1981, regarding the authority for the continuance of Government functions during the temporary lapse of appropriations, and affirm that the constitutional power of the purse resides with Congress.

H.R. Rep. No. 964, 101st Cong., 2d Sess. 1170 (1990). While hardly articulating the intended scope of the exception, the conference report does tend to support what would otherwise be the most natural reading of the amendment standing alone: because it is phrased as identifying the functions that should be excluded from the scope of the term "emergency," it seems intended to limit the coverage of that term, narrowing the circumstances that might otherwise be taken to constitute an emergency within the meaning of the statute.

Beyond this, however, we do not believe that the amendment adds any significant new substantive meaning to the pre-existing portion of section 1342, simply because the most prominent feature of the addition — its emphasis on there being a threat that is imminent, or "ready to take place, near at hand," *see Webster's Third New International Dictionary* 1130 (1986) — is an idea that is already present in the term "emergency" itself, which means "an unforeseen combination of circumstances or the resulting state that calls for immediate action" to respond to the occurrence or situation. *Id.* at 741. <sup>7</sup> The addition of the concept of "imminent" to the pre-existing concept of "emergency" is thus largely redundant. This redundancy does, however, serve to emphasize and reinforce the requirement that there be a

**APPENDIX B**  
**THE DELLINGER MEMO**

threat to human life or property of such a nature that immediate action is a necessary response to the situation. The structure of the amendment offers further support for this approach. Congress did not alter the operative language of the statute; instead, Congress chose to enact an interpretive provision that simply prohibits overly expansive interpretations of the “emergency” exception.

Under the formulation of the *1981 Opinion*, government functions satisfy section 1342 if, inter alia, the safety of human life or the protection of property would be “compromised, in some degree.” It is conceivable that some would interpret this phrase to be satisfied even if the threat were de minimis, in the sense that the increased risk to life or property were insignificant, so long as it were possible to say that safety of life or protection of property bore a reasonable likelihood of being compromised at all. This would be too expansive an application of the emergency provision. The brief delay of routine maintenance on government vehicles ought not to constitute an “emergency,” for example, and yet it is quite possible to conclude that the failure to maintain vehicles properly may “compromise, to some degree” the safety of the human life of the occupants or the protection of the vehicles, which are government property. We believe that the revised articulation clarifies that the emergencies exception applies only to cases of threat to human life or property where the threat can be reasonably said to be near at hand and demanding of immediate response.

WALTER DELLINGER  
Assistant Attorney  
General Office of Legal  
Counsel

1. We do not in this memorandum address the different set of issues that arise when the limit on the public debt has been reached and Congress has failed to raise the debt ceiling.

2. For the purposes of this inquiry, there are two relevant provisions of the Antideficiency Act. The first provides that “[a]n officer or employee of the United States Government or the District of Columbia government may not . . . involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.” 31 U.S.C. § 1341(a)(1)(B). The second provides that “[a]n officer or employee of the United States Government . . . may not accept voluntary services . . . or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.” 31 U.S.C. § 1342.

## APPENDIX B THE DELLINGER MEMO

3. These restrictions are enforced by criminal penalties. An officer or employee of the United States who knowingly and willfully violates the restrictions shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both. 31 U.S.C. § 1350.

4. The Attorneys General and this office have declined to catalog what actions might be undertaken this heading. In 1981, for example, Attorney General Civiletti quoted Attorney General (later Justice) Frank Murphy. “These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. . . . The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action.” 5 Op. O.L.C. at 7 n.9 (quoting 39 Op. Att’y Gen. 343, 347-48 (1939)). This power should be called upon cautiously, as the courts have received such Executive Branch assertions skeptically. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *George v. Ishimaru*, 849 F. Supp. 68 (D.D.C.), *vacated as moot*, No. 94-5111, 1994 WL 517746 (D.C. Cir., Aug. 25, 1994). *But see Haig v. Agee*, 453 U.S. 280 (1981); *In re Neagle*, 135 U.S. 1 (1890).

5. The *1981 Opinion* concluded that:

[d]espite the use of the term ‘voluntary service,’ the evident concern underlying this provision is not government agencies’ acceptance of the benefit of services rendered without compensation. Rather, the original version of Section [1342] was enacted as part of an urgent deficiency appropriation act in 1884, Act of May 1, 1994, ch. 37, 23 Stat. 15, 17, in order to avoid claims for compensation arising from the unauthorized provision of services to the government by non- employees, and claims for additional compensation asserted by government employees performing extra services after hours. This is, under [section 1342), government officers and employees may not involve government in contract for *employment*, i.e., for compensated labor, except in emergency situations. 30 Op. Att’y Gen. 129, 131 (1913).

6. 31 U.S.C. § 1515 (recodified from § 665(e) at the time of the Civiletti opinion). Analyzing past administrative practice under this statute, Attorney General Civiletti found that:

Directors of the Bureau of the Budget and of the Office of Management and Budget have granted dozens of deficiency reapportionments under this subsection in the last 30 years, and have apparently imposed no test more stringent than the articulation of a reasonable relationship between the funded activity and the safety of human life or the protection of property. Activities for which deficiency apportionments have been granted on this basis

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include [FBI] criminal investigations, legal services rendered by the Department of Agriculture in connection with state meat inspection programs and enforcement of the Wholesome Meat Act of 1967, 21 U.S.C. §§601-695, the protection and management of commodity inventories by the Commodity Credit Corporation, and the investigation of aircraft accidents by the National Transportation Safety Board. These few illustrations demonstrate the common sense approach that has guided [the interpretation] of Section 665(e). Most important, under Section 665(e)(2), each apportionment or reapportionment indicating the need for a deficiency or supplemental appropriation has been reported contemporaneously to both Houses of Congress, and, in the face of these reports, Congress has not acted in any way to alter the relevant 1950 wording of § 665(e)(1)(B), which is, in this respect, identical to § 665(b).

5 Op. O.L.C. at 9-10.

7. *See also* Random House Dictionary of the English Language Unabridged 636 (2d ed. 1987) (“emergency” means “a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action”); Webster’s II New Riverside University Dictionary 427 (1988) (“an unexpected, serious occurrence or situation urgently requiring prompt action”).

**APPENDIX C**  
**OMB CONTINUING RESOLUTION BULLETIN 12--02**



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

September 28, 2012

**OMB BULLETIN NO. 12-02**

**TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS**

**SUBJECT: Apportionment of the Continuing Resolution(s) for Fiscal Year 2013**

1. Purpose and Background. H.J. Res. 117 will provide continuing appropriations for the period October 1, 2012 through March 27, 2013. Section 110 of H.J. 117 requires that the joint resolution be implemented so that only the most limited funding actions shall be taken in order to provide for continuation of projects and activities, and section 109 requires that programs restrict funding actions so as not to impinge on the final funding prerogatives of the Congress. I am automatically apportioning amounts provided by sections 101(a) and 101(b) of this continuing resolution (CR) as specified in section 3. The amounts provided by the 0.612 percent across-the-board (ATB) increase in section 101(c) will be subject to the procedures for apportioning that funding as outlined in section 4. This Bulletin supplements instructions for apportionment of CRs in OMB Circular No. A-11, sections 120 and 123.

The Administration continues to urge Congress to pass a balanced package of deficit reduction that would replace the potential sequestration on January 2, 2013, under section 251A of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended (BBEDCA). If necessary, the Bulletin will be amended to address that sequestration. Unless and until the Bulletin is amended, however, agencies should continue normal spending and operations, as instructed in the July 31 memo from OMB to executive departments and agencies which addressed operational and other issues raised by the potential January 2 sequestration. Unless the Bulletin is subsequently amended, it should be assumed to apply to both this CR and any extensions of this CR.

NOTE: Although the CR Bulletin does not automatically or otherwise apportion budgetary resources for accounts that are not determined by current appropriation action of the Congress (such as mandatory funding and balances of prior year budget authority), those apportionments will also be amended if necessary, to reapportion sequestrable resources to account for the potential January 2 sequestration. The guidance above to spend and operate normally until further notice also applies to these other resources.

2. Amounts Provided. Section 101(a) of H.J. Res. 117 provides such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year (FY) 2012 and under the authority and conditions provided in such stated Acts, for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in H.J. Res. 117, that were conducted in FY 2012, and for

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Appropriations Act, 2012 (Public Law 112-55), except for appropriations in that Act designated by the Congress as being for disaster relief, the Consolidated Appropriations Act, 2012 (Public Law 112-74), and the Disaster Relief Appropriations Act, 2012 (Public Law 112-77), except for appropriations in that Act under the heading "Corps of Engineers-Civil".

Section 101(b) provides that notwithstanding section 101 whenever an amount designated for Overseas Contingency Operations (OCO)/Global War on Terrorism (GWOT) pursuant to section 251(b)(2)(A) of BBEDCA in either the Department of Defense Appropriations Act, 2012 (division A of Public Law 112-74) or in the Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2012 (division H of Public Law 112-74) that would be made available for a project or activity is different from the amount requested in the President's FY 2013 Budget request, the project or activity shall be continued at a rate for operations that would be permitted by, and such designation shall be applied to, the amount in the President's FY 2013 Budget request. For purposes of calculating the rate for operations, the reference to "amount" in section 101(b) is assumed to mean the budget account total.

**Section 101(c) increases the rate for operations provided by subsection (a) by 0.612 percent. Such increase does not apply to OCO/GWOT amounts or to amounts incorporated in the joint resolution by reference to the Disaster Relief Appropriations Act, 2012 (Public Law 112-77).**

3. Automatic Apportionments. Attachment A contains more detailed instructions on calculating the annualized amount provided by the CR. In order to calculate the amount automatically apportioned through the period ending March 27, 2013 (and any extensions thereof) multiply the annualized amount provided by the CR in sections 101(a) and 101(b) by the lower of:

- **the percentage of the year (pro-rata) covered by the CR (e.g., for H.J. Res. 117 use 48.77 percent), or**
- **the historical seasonal rate of obligations for the period of the year covered by the CR.**

Unless determined otherwise by your RMO, all automatically apportioned CR funds are apportioned as Category B (lump sum), regardless of quarterly restrictions (i.e., amounts on Category A) imposed in last year's apportionments. Limitations on programs (i.e., other Category Bs) and footnotes included in last year's apportionments remain in effect under the CR.

Apportionment of the 0.612 percent ATB increase in section 101(c) is discussed in section 4.

**4. Amounts Provided by Section 101(c) Excluded from Automatic Apportionment.** This automatic apportionment does not apply to amounts provided by the 0.612 percent ATB increase in section 101(c) of H.J. Res. 117. The agency may submit a written apportionment to OMB to request these funds during the period of the CR.

5. Accounts with Zero Funding Excluded from Automatic Apportionment. As has been the case in recent CR Bulletins, including FY 2012, if either the House or Senate has reported or passed a bill that provides no funding for an account at the time the CR is enacted or extended, this automatic apportionment does not apply to that account. (Reported bills are those that have been filed by the full House or Senate Appropriations Committee for floor action.) The agency may

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filed by the full House or Senate Appropriations Committee for floor action.) The agency may submit a written apportionment to OMB to request funds for the account during the period of the CR, if needed.

6. Programs under Section 111. Funds for appropriated entitlements and other mandatory payments, and activities under the Food and Nutrition Act of 2008, are automatically apportioned amounts as needed to carry out programs at a rate to maintain program levels under current law, i.e., at the FY 2013 level. However, this automatic apportionment does not apply to programs with more complex funding structures. Agencies should contact their RMO representatives to determine if their account is automatically apportioned or if a written apportionment is required.

With regard to the associated administrative expenses for those programs, section 111 does not apply. The associated administrative expenses are automatically apportioned at the pro-rata level based on FY 2012 annualized levels in section 101(a).

As noted in section 1, this automatic apportionment will be amended, if necessary, to reapportion sequestrable resources to account for the sequestration order that the President may be required to issue on January 2, 2013, under section 251A of BBEDCA. Until such time as the Bulletin is amended, agencies should continue normal spending and operations, as instructed in the July 31 memo from OMB to executive departments and agencies which addressed operational and other issues raised by the potential January 2 sequestration.

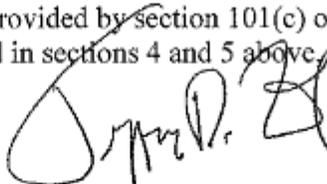
7. Credit Limitations. If there is an enacted credit limitation (i.e., a limitation on loan principal or commitment level) in FY 2012, then the automatic apportionment is the pro-rata share of the credit limitation or the budget authority (i.e., for subsidy cost), whichever is less. To calculate amounts available, see exhibit 123B of OMB Circular No. A-11.

8. Written Apportionments for Amounts Provided by Sections 101(a) and 101(b). If an agency seeks an amount for a program that is more than the amount automatically apportioned under sections 101(a) and 101(b), a written apportionment must be requested from OMB. OMB expects to grant only a very limited number of these written apportionment requests. Each of these requests must be accompanied by a written justification that includes the legal basis for the exception apportionment. Similarly, an RMO or an agency may determine that an amount for a program should be less than the amount automatically apportioned by sections 101(a) and 101(b) in order to ensure that an agency does not impinge on the final funding prerogatives of the Congress. In these cases, a written apportionment will also be required.

Agencies do not need to request a new written apportionment for each extension of the CR (unless otherwise required by your RMO). Instead, in the case of accounts that receive a written apportionment at any time during the CR period, the automatic apportionment will apply to such accounts under any subsequent extensions of the CR, provided that the total amount apportioned during the CR period does not exceed the total annualized level of the CR. However, any footnotes on the written apportionment continue to apply to the accounts, when subsequently operating under the automatic apportionment.

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The written apportionments described in this section are not intended to address the written apportionment requirements for amounts provided by section 101(c) or accounts with zero funding. Those requirements are described in sections 4 and 5 above, respectively.



Jeffrey D. Zients  
Deputy Director for Management

**Attachment(s)**

**Attachment A: Continuing Resolution Frequently Asked Questions**

**Attachment B: Non-CHIMP Cancellations Recurring in a 2013 Continuing Resolution**

**Attachment C: Changes in Mandatory Programs Recurring in a 2013 Continuing Resolution**

**APPENDIX D**  
**DOD FUNDING GAP GUIDANCE (2011)**



**DEPUTY SECRETARY OF DEFENSE**  
1010 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1010

**APR 07 2011**

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS  
CHAIRMAN OF THE JOINT CHIEFS OF STAFF  
UNDER SECRETARIES OF DEFENSE  
DEPUTY CHIEF MANAGEMENT OFFICER  
COMMANDERS OF THE COMBATANT COMMANDS  
ASSISTANT SECRETARIES OF DEFENSE  
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE  
DIRECTOR, OPERATIONAL TEST AND EVALUATION  
DIRECTOR, COST ASSESSMENT AND PROGRAM EVALUATION  
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE  
ASSISTANTS TO THE SECRETARY OF DEFENSE  
DIRECTOR, ADMINISTRATION AND MANAGEMENT  
DIRECTOR, NET ASSESSMENT  
DIRECTORS OF THE DEFENSE AGENCIES  
DIRECTORS OF THE DOD FIELD ACTIVITIES

**SUBJECT:** Guidance for Continuation of Operations in the Absence of Available Appropriations

The current Continuing Resolution providing FY 2011 appropriations for the Department of Defense (DoD) expires at midnight on April 8, 2011. The Secretary and I still hope that we receive continued appropriations beyond this date. However, we must plan for possible expiration of the Department's appropriations.

The attachment to this memorandum provides instructions for continuation of essential operations in the absence of appropriated funds. The Department will, of course, continue to prosecute the war in Afghanistan, including preparation of forces for deployment into that conflict. The DoD will also continue completing the military commitment in Iraq as well as Libya and Japan operations. The Department must, as well, continue many other operations necessary for the safety of human life and protection of property including operations essential for the security of our nation. These activities will be "excepted" from cessation; all other activities would need to be shut down in an orderly and deliberate fashion, including—with few exceptions—the cessation of temporary duty travel.

All military personnel will continue in a normal duty status regardless of their affiliation with excepted or non-excepted activities. Military personnel will serve without pay until such time as Congress makes appropriated funds available to compensate them for this period of service. Civilian personnel who are engaged in excepted activities will also continue in normal duty status and also will not be paid until Congress makes appropriated funds available. Civilian employees not engaged in excepted activities will be furloughed, i.e., placed in a non-work, non-pay status.

The responsibility for determining which functions would be excepted from shut down resides with the Military Department Secretaries and Heads of DoD Components, who may



OSD 04092-11



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delegate this authority as they deem appropriate. The attached guidance should be used to assist in making this excepted determination. The guidance does not identify every excepted activity, but rather provides overarching direction and general principles for making these determinations. It should be applied prudently in the context of a Department at war, with decisions guaranteeing our continued robust support for those engaged in that war, and with assurance that the lives and property of our nation's citizens will be protected.

This memorandum contains guidance to begin detailed planning; no specific employee furlough notifications are yet authorized. Nor should any shutdown actions be taken until you receive further notice.

Within the Office of the Secretary of Defense, the Under Secretary of Defense (Comptroller) will take the lead in preparing for operations in the absence of appropriations, assisted by other offices as necessary.

To repeat, the Secretary and I hope that DoD will receive continued appropriations. This guidance is intended to support prudent planning.



Attachment:  
As stated

cc:  
Director for National Intelligence

**APPENDIX D**  
**DOD FUNDING GAP GUIDANCE (2011)**

**GENERAL INFORMATION**

This document provides guidance for identifying those missions and functions of the Department of Defense that may continue to be carried out in the absence of available appropriations. The information provided in this document is not exhaustive, but rather illustrative, and is intended primarily to assist in the identification of those activities that may be continued notwithstanding the absence of available funding authority in the applicable appropriations (excepted activities). Activities that are determined not to be excepted, and which cannot be performed by utilizing military personnel in place of furloughed civilian personnel, will be suspended when appropriated funds expire. The Secretary of Defense may, at any time, determine that additional activities shall be treated as excepted.

**Military Personnel**

Military personnel are not subject to furlough. Accordingly, military personnel on active duty, including reserve component personnel on Federal active duty, will continue to report for duty and carry out assigned duties. In addition to carrying out excepted activities, military personnel on active duty may be assigned to carry out non- excepted activities, in place of furloughed civilian personnel, to the extent that the non- excepted activity is capable of performance without incurring new obligations.

Reserve component personnel performing Active Guard Reserve (AGR) duty will continue to report for duty to carry out AGR authorized duties. Reserve component personnel will not perform inactive duty training resulting in the obligation of funds, except where such training directly supports an excepted activity, and may not be ordered to active duty, except in support of those military operations and activities necessary for national security listed in Attachment 2, including fulfilling associated pre-deployment requirements. Orders for members of the National Guard currently performing duties under 32 U.S.C. 502(f) will be terminated unless such duties are in support of excepted activities approved by the Secretary of Defense.

Movement of military personnel will be limited as follows:

- 1) Moves TO an excepted activity will continue.
- 2) Moves FROM an excepted activity will continue only to the extent the commander of the excepted activity determines it essential to mission (e.g., overburden of local infrastructure), or required to enhance support of excepted activities.
- 3) Accession and training moves associated with recruitment and initial entry training will continue, along with subsequent movement to first station when required by "1" above.
- 4) Movement to comply with separation instructions will continue.

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**DOD FUNDING GAP GUIDANCE (2011)**

**Civilian Personnel**

Civilian personnel, including military technicians, who are not necessary to carry out or support excepted activities are to be furloughed. Only the minimum number of civilian employees necessary to carry out excepted activities will be exempt from furlough. Positions that provide direct support to excepted positions may also be deemed except if they are critical to performing the excepted activity. Determinations regarding the status of civilian positions will be made on a position by position basis, using the guidance in this document. Determinations shall be made for all positions, including those in the Senior Executive Service or equivalent, as well as those located overseas.

Following the expiration of appropriations, a minimum number of civilian employees may be retained as needed to execute an orderly suspension of non- excepted activities within a reasonable timeframe.

Senate-confirmed officials appointed by the President are not subject to furlough. Their immediate office personnel necessary to support excepted activities may be exempt from furlough at the discretion of the appointee.

Foreign national employees paid with host country funds are exempt from furlough. Additionally, foreign national employees governed by country-to-country agreements that prohibit furloughs are exempt from furlough.

Civilian personnel whose salaries are paid with expired appropriations and later reimbursed from a non-DoD source (e.g., the Foreign Military Sales Trust Fund) are not exempt from furlough solely on that basis. Personnel whose salaries are paid from a DoD appropriation or fund that has sufficient funding authority (e.g., multiyear appropriations with available balances from prior years) will not be subject to furlough. Heads of activities may, on their authority, require the return to work of civilian personnel in the event of developments (natural disasters, accidents, etc.) that pose an imminent danger to life or property.

**Temporary Duty (TDY) Travel**

In the absence of appropriations, TDY travel scheduled to begin after the shutdown occurs should be cancelled, except as noted below. Any TDY travel that began prior to the shutdown should, except as noted below, be terminated as quickly as possible, but in an orderly fashion.

All TDY travel in direct support of the war in Afghanistan, the transition in Iraq, and operations in Libya and Japan, and other travel directly related to safety of life and protection of property, as well as foreign relations (e.g., negotiating international agreements), may be undertaken or continued only if approved, in writing, by the appropriate approval authority listed below and only in the most limited circumstances. The approval authority (which may be delegated to appropriate senior officials) for any such TDY travel is the:

- Secretary of a Military Department for personnel assigned to that Military Department
- Head of the agency for personnel assigned to that defense agency

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- Chairman of the Joint Chiefs of Staff for personnel assigned to the Joint Staff
- Combatant Commander for personnel assigned to that combatant command
- Principal Staff Assistant (PSA) for personnel assigned to that office

Notwithstanding the approval authority stated above, all TDY travel by Presidential Appointed – Senate Confirmed (PAS) personnel must be approved by the Deputy Secretary of Defense.

Approving officials will implement a mechanism within their organizations for approving such travel.

**Contracts**

Contractors performing under a contract that was fully obligated upon contract execution (or renewal) prior to the expiration of appropriations may continue to provide contract services, whether in support of excepted activities or not. However, new contracts (including contract renewals or extensions, issuance of task orders, exercise of options) may not be executed unless the contractor is supporting an excepted activity. No funds will be available to pay such new contractors until Congress appropriates additional funds.

The expiration of an appropriation does not require the termination of contracts (or issuance of stop work orders) funded by that appropriation unless a new obligation of funds is required under the contract and the contract is not required to support an excepted activity. In cases where new obligation is required and the contract is not required to support an excepted activity, the issuance of a stop work order or the termination of the contract will be required.

The Department may continue to enter into new contracts, or place task orders under existing contracts, to obtain supplies and services necessary to carry out or support excepted activities even though there are no available appropriations. It is emphasized that this authority is to be exercised only when determined to be necessary - where delay in contracting would endanger national security or create a risk to human life or property.

Additionally, when authorized by the Secretary of Defense, contracts for covered items may be entered into under the authority of the Feed and Forage Act.

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DOD FUNDING GAP GUIDANCE (2011)**

**PROTECTION OF LIFE AND PROPERTY  
NATIONAL SECURITY**

<p><b>Excepted</b></p>	<ul style="list-style-type: none"> <li>• Military operations and activities authorized by deployment or execute orders, or otherwise approved by the Secretary of Defense, and determined to be necessary for national security, including administrative, logistical, medical, and other activities in direct support of such operations and activities; training and exercises required to prepare for and carry out such operations.</li> <li>• Activities of forces assigned or apportioned to combatant commands to execute planned or contingent operations necessary for national security, including necessary administrative, logistical, medical, and other activities in direct support of such operations; training and exercises required to prepare for and carry out such operations.</li> <li>• Activities necessary to continue recruiting for entry into the Armed Forces during contingency operations (as such term is defined in 10 U.S.C 101(13)), including activities necessary to operate Military Entrance Processing Stations (MEPS) and to conduct basic and other training necessary to qualify such recruited personnel to perform their assigned duties.</li> <li>• Command, control, communications, computer, intelligence, surveillance, and reconnaissance activities required to support national or military requirements necessary for national security or to support other excepted activities, including telecommunications centers and phone switches on installations, and secure conference capability at military command centers.</li> <li>• Activities required to operate, maintain, assess, and disseminate the collection of intelligence data necessary to support tactical and strategic indications and warning systems, and military operational requirements.</li> <li>• Activities necessary to carry out or enforce treaties and other international obligations.</li> </ul>
<p><b>Footnotes</b></p>	<p>Activities involving technical intelligence information collection, analysis and dissemination functions not in direct support of excepted activities (e.g., general political and economic intelligence unrelated to ongoing or contingency military operations, support of acquisition programs, support to operational test and evaluation, intelligence policy security promulgation and development, systems development and standards, policy and architecture) are not excepted activities.</p>

**APPENDIX D  
DOD FUNDING GAP GUIDANCE (2011)**

**PROTECTION OF LIFE AND PROPERTY  
NATIONAL SECURITY**

<b>Excepted</b>	<ul style="list-style-type: none"><li>• Military operations and activities authorized by deployment or execute orders, or otherwise approved by the Secretary of Defense, and determined to be necessary for national security, including administrative, logistical, medical, and other activities in direct support of such operations and activities; training and exercises required to prepare for and carry out such operations.</li><li>• Activities of forces assigned or apportioned to combatant commands to execute planned or contingent operations necessary for national security, including necessary administrative, logistical, medical, and other activities in direct support of such operations; training and exercises required to prepare for and carry out such operations.</li><li>• Activities necessary to continue recruiting for entry into the Armed Forces during contingency operations (as such term is defined in 10 U.S.C 101(13)), including activities necessary to operate Military Entrance Processing Stations (MEPS) and to conduct basic and other training necessary to qualify such recruited personnel to perform their assigned duties.</li><li>• Command, control, communications, computer, intelligence, surveillance, and reconnaissance activities required to support national or military requirements necessary for national security or to support other excepted activities, including telecommunications centers and phone switches on installations, and secure conference capability at military command centers.</li><li>• Activities required to operate, maintain, assess, and disseminate the collection of intelligence data necessary to support tactical and strategic indications and warning systems, and military operational requirements.</li><li>• Activities necessary to carry out or enforce treaties and other international obligations.</li></ul>
<b>Footnotes</b>	<p>Activities involving technical intelligence information collection, analysis and dissemination functions not in direct support of excepted activities (e.g., general political and economic intelligence unrelated to ongoing or contingency military operations, support of acquisition programs, support to operational test and evaluation, intelligence policy security promulgation and development, systems development and standards, policy and architecture) are not excepted activities.</p>

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DOD FUNDING GAP GUIDANCE (2011)**

**LEGAL ACTIVITIES**

<b>Excepted</b>	<ul style="list-style-type: none"> <li>• <b>Litigation activities associated with imminent or ongoing legal action, in forums inside or outside of DoD, to the extent required by law or necessary to support excepted activities.</b></li> <li>• <b>Legal support for excepted activities, including legal assistance for military and civilian employees deployed, or preparing to deploy, in support of military or stability operations.</b></li> <li>• <b>Legal activities needed to address external (non-judicial) deadlines imposed by non-DoD enforcement agencies, to the extent necessary to continue excepted activities.</b></li> </ul>
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**AUDIT AND INVESTIGATION COMMUNITY**

<b>Excepted</b>	<ul style="list-style-type: none"> <li>• <b>Criminal investigations related to the protection of life or property, including national security, as determined by the head of the investigating unit, and investigations involving undercover activities.</b></li> <li>• <b>Counterterrorism and counterintelligence investigations.</b></li> </ul>
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**MORALE WELFARE & RECREATION/NONAPPROPRIATED FUNDS**

<b>Excepted</b>	<ul style="list-style-type: none"> <li>• <b>Morale, Welfare, and Recreation (MWR) and Non-Appropriated Fund (NAF) activities necessary to support excepted activities, e.g., operation of mess halls; physical training; child care activities required for readiness.</b></li> </ul>
<b>Footnotes</b>	<ul style="list-style-type: none"> <li>• <b>Activities funded entirely through NAF sources will not be affected.</b></li> <li>• <b>Military personnel may be assigned to carry out or support non-excepted MWR activities, where deemed necessary or appropriate, to replace furloughed employees.</b></li> </ul>

**FINANCIAL MANAGEMENT**

<b>Excepted</b>	<ul style="list-style-type: none"> <li>• <b>Activities necessary to control funds, record new obligations incurred in the performance of excepted activities, and manage working capital funds.</b></li> <li>• <b>Activities necessary to effect upward adjustment of obligations and the reallocation of prior-year unobligated funds in support of excepted activities.</b></li> </ul>
<b>Footnote</b>	<ul style="list-style-type: none"> <li>• <b>Preparation of financial reports, research and correction of problem disbursements, adjustments to prior-year funds (excepted as noted above) including those related to programs and contracts that do not support excepted activities, and approval of the use of currently available funds to pay obligations against closed accounts are not excepted activities.</b></li> </ul>

**APPENDIX D  
DOD FUNDING GAP GUIDANCE (2011)**

**WORKING CAPITAL FUND/REVOLVING FUNDS**

<b>Excepted</b>	<ul style="list-style-type: none"><li>• <b>Defense Working Capital Fund (DWCF)/Revolving Fund (RF) activities with positive cash balances may continue to operate until cash reserves are exhausted.</b></li><li>• <b>When cash reserves are exhausted, DWCF/RF activities must continue operations in direct support of excepted activities.</b></li><li>• <b>DWCF/RF activities may continue to accept orders financed with appropriations enacted prior to FY 2011 or unfunded orders from excepted organizations. Unfunded orders will be posted to accounts receivable and not actually billed until appropriations are enacted.</b></li></ul>
<b>Footnotes</b>	<ul style="list-style-type: none"><li>• <b>DWCFs/RFs are not directly impacted by a lapse in annual appropriations.</b></li><li>• <b>Management actions should be taken to sustain operations and minimize operational impact resulting from late approval of annual appropriations.</b></li><li>• <b>Management actions which could be taken to conserve cash reserves include: delay of training, minimal travel, reduction in supplies, and other actions consistent with management objectives.</b></li><li>• <b>Inter-DWCF/RF billings will continue unless a suspension request is approved by the Office of the Under Secretary of Defense (Comptroller),</b></li><li>• <b>Approval may be requested for advance billing of funded customer orders.</b></li><li>• <b>Plan guidance for excepted activities is applicable to DWCF/RF internal operations.</b></li></ul>

**APPENDIX E**  
**CONTINUING RESOLUTIONS 1998-2010**

**Table 2. Number and Duration of Continuing Resolutions: FY1998-FY2010**

<b>Fiscal Year</b>	<b>Number of Continuing Resolutions</b>	<b>Duration in Days<sup>a</sup></b>	<b>Average Duration for Each Act</b>	<b>Final Expiration Date</b>
1998	6	57	9.5	11-26-1997
1999	6	21	3.5	10-21-1998
2000	7	63	9.0	12-02-1999
2001	21	82	3.9	12-21-2000
2002	8	102	12.8	01-10-2002
2003	8	143	17.9	02-20-2003
2004	5 <sup>b</sup>	123	24.6	01-31-2004
2005	3	69	23.0	12-08-2004
2006	3	92	30.7	12-31-2005
2007	4	365	91.3	09-30-2007
2008	4	92	23.0	12-31-2007
2009	2	162	81.0	03-11-2009
2010	2	79	39.5	12-18-2009
<b>Total</b>	<b>79</b>	<b>1,450</b>	<b>—</b>	<b>—</b>
<b>Annual Average</b>	<b>6.1</b>	<b>111.5</b>	<b>18.4</b>	<b>—</b>

Source: Prepared by the Congressional Research Service.

- a. Duration is measured, in the case of the initial continuing resolution for a fiscal year, from the first day of the year (October 1). For subsequent continuing resolutions for a fiscal year, duration is measured from the expiration date of the preceding continuing resolution.
- b. The fifth continuing resolution for FY2004 did not change the expiration date of January 31, 2004, established in the preceding continuing resolution.